UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 9

DURA-LINE CORPORATION,
A SUBSIDIARY OF MEXICHEM

Respondent,

and

UNITED STEEL PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO-CLC, AND LOCAL 14300-12

Charging Parties.

Cases 09-CA-163289
09-CA-164263
09-CA-165972
09-CA-166481
09-CA-167265

RESPONDENT'S REPLY TO THE COUNSEL FOR THE GENERAL COUNSEL'S AND CHARGING PARTIES' ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

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I. INTRODUCTION

Pursuant to Section 102.46 of the Rules and Regulations of the National Labor Relations Board ("Board"), 29 C.F.R. §102.46, Respondent files this reply brief to the Counsel for the General Counsel's Answering Brief to Respondent's Exceptions to the Administrative Law Judge's Decision and Its Brief in Support Thereof ("GC's Answering Brief") and Charging Parties' Response to Objections (CPs' Brief) . For the reasons discussed below, Respondent respectfully requests that the Board reject the arguments in GC's Answering Brief and CPs' Brief, and sustain Respondent's Exceptions as set forth in Respondent's Exceptions to the Administrative Law Judge's Decision and Its Brief in Support Thereof ("Respondent's Exceptions").

II. ARGUMENT

A. The Overwhelming Evidence Demonstrates that the Alleged Comments and/or Actions of Respondent's Middlesboro Management Cannot be Imputed to Respondent's Corporate Decisionmakers Because Respondent's Middlesboro Management Played No Part in the Decision to Close the Middlesboro Plant and Transfer the Work, and Respondent's Corporate Decisionmakers Had No Knowledge Regarding the Filing of Grievances at the Middlesboro Plant

In GC's Answering Brief and CPs' Brief, the GC and Charging Parties ask the Board to affirm the ALJ's finding that the union and the union's grievance filing activities were the motivating factor in Respondent's decision to close the Middlesboro plant and transfer the work. To support this request, the GC and Charging Parties merely recite the alleged comments and actions of Respondent's Middlesboro management, who played no role in the decision to close the Middlesboro plant and transfer the work to the Clinton, Ohio and Georgia facilities. Specifically, GC argues that such comments and actions should be imputed to Respondent's Corporate decision-makers pursuant to *G4S Secure Solutions (USA), Inc.* 364 NLRB No. 92 (2016), *Vision of Elk River, Inc.*, 359 NLRB 69 (2012), and *Vico Products, Co.*, 336 NLRB 583

(2001), enfd. 333 F.3d 199 (D.C. Cir. 2003). While the cases cited by the GC hold that a manager's or supervisor's knowledge of an employee's protected concerted activities should be imputed to the decisionmaker unless the employer affirmatively establishes a basis for negating such imputation, the facts in these cases are clearly distinguishable from the instant case and are not persuasive.

In *G4S Secure Solutions*, the Board found that a manager who was angry about the charging party's protected conduct told the decisionmaker to fire the charging party. 364 NLRB No. 92 at 3. Based on this evidence, the Board stated that it was unclear who the decisionmaker was or, at a minimum, the respondent had otherwise failed to present sufficient evidence for declining the inference that to decline the imputation. Similarly, in *Vision of Elk River*, the Board found that the manager with knowledge of the protected activity was in fact a co-decisionmaker. 359 NLRB at 72. Finally, in *Vico Products*, the Board found that one of the decisionmakers, a part owner, made threats in connection with the union campaign which preceded his decision to relocate work after the plant was organized. Consequently, in each of these cases managers who had engaged in discriminatory conduct had a direct link to the decisionmaker and/or the decision.

In stark contrast to the facts in these cases, there is no evidence whatsoever in the instant case that the Middlesboro managers influenced, were consulted about, or played any role in the decision to close the Middlesboro plant and transfer the work. In fact, the undisputed evidence shows that the Middlesboro management was not even aware of the decision to close the Middlesboro plant and transfer the work until they were informed by corporate in August 2015, long after the decision was made. Where there is no evidence that supervisors or managers shared information about protected activity to the decisionmaker, such knowledge cannot be imputed to the decisionmaker. *Music Express East, Inc.* 340 NLRB 1063 (2003)(declining to

impute supervisor's knowledge to employer because supervisor did not relay knowledge to decisionmaker). Further and importantly, there is no evidence that Respondent's corporate decisionmakers and/or Mexichem engaged in any activities demonstrating union animus.

Moreover, contrary to the GC's and Charging Parties' assertion that "evidence of motivation and animus are displayed in many of Respondent's internal documents which repeatedly mention the union" (GC Answering Brief at 7; CPs' Brief at 4), the only references to the union in Respondent's relevant Capital Appropriations Request ("CAR") documents at the time the decision was made to close the Middlesboro plant in September 2014 include background information stating that the Middlesboro plant was unionized and the fact that the collective bargaining agreement contained a limitation regarding the inability to operate the Middlesboro plant 24 x 7. (R. Ex. 3). Further, as discussed in Respondent's Exceptions, this limitation was only one of twenty limitations regarding the Middlesboro plant, and the other nineteen limitations were major impediments to expanding production at the Middlesboro plant.

Importantly, at the time the decision to close the plant in September 2014, there were no references to the "upcoming bargaining obligation" in any documents. It was not until Respondent was in the process of implementing the decision that references to the "upcoming bargaining obligation" appear in the CAR documents (R. Ex. 4).

The GC and Charging Parties also assert that certain post-decision conduct, namely "requiring union employees to go to the new facility in Clinton, Tennessee" rather than transferring the employees demonstrates union animus regarding the decision to close the Middlesboro plant and transfer the work. Like the ALJ, the GC cited *Allied Mills, Inc.* 218 NLRB 281 (1975) in support of this assertion. However, like the other cases cited in the GC's Answering Brief, *Allied Mills* is factually distinguishable from the instant case. Specifically, while *Allied Mills* involved a plant closure and transfer of work, the Board did not find that the

employer's refusal to discuss the transfer of union employees demonstrated union animus regarding the ***decision*** to close the plant and relocate work; rather the Board found such refusal demonstrated union animus solely in connection with the termination of employees after the decision to close was made. Thus, in *Allied Mills,* the Board did not find that the decision to close the plant violated the Act and did not order that the employer restore the operations of the closed plant. Rather Board merely ordered the employer to offer jobs to employees who desired to transfer to the new plant.

Further, Charging Parties assert that the fact that Respondent kept its decision to close the plant secret demonstrates union animus. To support this assertion, Charging Parties cite *Vico Prods. Co.* 336 NLRB 583 (2001) for the proposition that an employer's secrecy is evidence of union animus even where the employer keeps its plans secret not only from the union, but also other interested parties. However, *Vico Prods. Co.* is clearly factually distinguishable from the instant case.

In *Vico Prods. Co.*, the Board found that the employer's decision to relocate its plant was motivated by union animus because (1) the decisionmaker told employees that they would be laid off if they voted for the union in the upcoming union election, (2) the decision to relocate the plant was made shortly after the union won the election, (3) the employer had clearly intended to remain in the original plant prior to the union election because it had obtained financial and tax incentives from the state shortly before the union election which required the employer to remain in the original plant to receive these incentives, and lastly, (4) the employer was secretive in its implementation of the relocation because the decisionmaker lied to the union representative by telling him that the plant would not be relocated shortly after decision to relocate had been made, the relocation of the plant's equipment occurred in the dead of night so no one would know about the relocation, and the employer told its main customer about the relocation just days

before the relocation even though the employer had consulted with the customer in advance when it previously moved other operations out of state to allow the customer to have input into that prior relocation.

The facts in the instant case are dramatically different. Here, there is no evidence that the decisionmakers engaged in any anti-union conduct, the decision to close the Middlesboro plant was made by decisionmakers who were unaware of any union activities including the filing of grievances, Respondent decided to close the Middlesboro plant in September 2014 and never wavered from this decision. Further, Respondent announced the plant closure months in advance of the actual closing in an orderly manner by first notifying Middlesboro plant management in August 2015, then plant employees in September, and then the public in November 2015.

Finally, the GC's Answering Brief and CPs' Brief argue that Respondent's corporate decisionmakers had knowledge of the union's filing of grievances because Middlesboro human resources manager, Patsy Wilhoit, told former union president, Freddie Chumley, that she logged the grievances into the computer system, "the corporate officials saw them," and "they did not like it." GC Answering Brief at 3. However, the only evidence in the record regarding whether corporate officials were aware of the grievances is Ms. Wilhoit's testimony that the only time that she would communicate with "corporate" about grievances was if they were "at step 3," as corporate would become involved at that point, and that she would communicate with corporate human resources director Tamara Fraley regarding such grievances (Tr. 210). However, there is no evidence in the record regarding if or how many grievances reached step 3. Additionally, there is no evidence that Ms. Fraley was involved in the decision to close the Middlesboro plant and transfer work or that she shared any information regarding the grievances with Respondent's corporate decisionmakers. Consequently, any assumption that the corporate decisionmakers were aware of the grievances simply because they were "available" on the common drive is wholly

speculative and contrary the undisputed testimony of the corporate decisionmakers who denied any knowledge of the grievances.

B. The Convincing Evidence Demonstrates that Respondent Would Have Made the Decision to Close the Middlesboro Plant and Transfer Work Absent Any Alleged Union Animus

Assuming *arguendo* that the GC can establish a *prima facie* case of union animus regarding the decision to close the Middlesboro plant and transfer the work, it is clear that Respondent would have made the decision absent any alleged union animus. The overwhelming financial benefits of closing the Middlesboro plant and transferring the work is well documented in Respondent's Exceptions. Interestingly, the GC asserts in GC's Answering Brief that Respondent was motivated to close the plant and relocate the work as a result of the filing of the grievances because the "grievances cost Respondent fifty dollars ($50) every time R. Hatfield filed one because it had to be reviewed by the corporate lawyers." GC Answering Brief at 4. Significantly, there is no other evidence in the record that the filing of the grievances involved any other costs.

The evidence is undisputed that, at the time Respondent made the decision to close the plant and relocate the work, Respondent determined that it needed to invest $16,842,239 to close the Middlesboro plant relocate the work to the new plant (R. Ex. 4, 2nd page) and an additional $3,474,000 to transfer the work to the Ohio and Georgia facilities (R. Ex. 6, 3rd page). Simply put, it is inconceivable that Respondent would spend more than $20 million dollars to close the Middlesboro plant and transfer the work to the Clinton, Ohio, and Georgia facilities in order to avoid grievances which cost $50 apiece to process.

Further, as discussed in Respondent's Exceptions, the evidence is undisputed that Respondent could not have invested this money to improve the productivity of the Middlesboro plant because of the plant's physical limitations and that the transfer of work to the Clinton,

Ohio, and Georgia facilities would result in $9.6 million in annual incremental profits. Thus, the only reasonable conclusion is that Respondent would have decided to close the Middlesboro plant and transfer the work for legitimate business reasons regardless of the union and/or the filing of grievances.

In Charging Parties' Brief, the Charging Parties characterize this matter as a "classic runaway shop case." Significantly, Charging Parties concede that the decision to close the Middlesboro plant and transfer work was made in September 2014. However, they argue that this timing actually supports the "runaway shop theory" because the decision was made "contemporaneous with Mexichem's purchase of the Company" and cite *In re Royal Norton Manufacturing Co.*, 189 NLRB 489 (1970) as authority. However, *In re Royal Norton Manufacturing Co.* is factually distinguishable from the instant case.

In that case, the evidence showed that the new owner, who was the decisionmaker regarding the plant closing, made numerous anti-union comments both before and during the decision to close the plant and stated that the union's filing of "grievances together with the filing of unfair labor practice charges . . . were the straw that broke the camel's back." *Id*. at 490.

In stark contrast to *In re Royal Norton Manufacturing Co*., there is no evidence whatsoever that Respondent's corporate decisionmakers or Mexichem engaged in any anti-union conduct or statements. Moreover, Charging Parties attempt to characterize statements made by non-decisionmaker Patsy Wilhoit as proof that Mexichem did not like the union. Charging Parties' Brief at 4. Specifically, the Charging Parties cite page 118 of the hearing transcript and assert that "Wilhoit told Elmer Evans that Mexichem did not like the Middlesboro plant because it was unionized." *Id.* However, the undisputed evidence demonstrated that Wilhoit played no part in the decision to close the plant and/or transfer the work and Evans testified that this

alleged conversation occurred in 2015, long after the decision to close the plant and transfer the work was made.

C. The Union Agreed in the April 18 2013 Side Letter to the Collective Bargaining Agreement (CBA) that the Current Practice During the 2013 – 2016 CBA was to Pay $16 for the Thanksgiving Bonus

The April 18, 2013 side letter, which appears on page 29 of the parties' 2013 – 2016 CBA, provides in relevant part:

> This is to confirm that the Company and Union reviewed all "side letters" during the recently concluded contract negotiations to determine their relevance. ***During this process the parties agreed to eliminate all "side letters" as portions of these "side letters" which are no longer relevant. The language from these "side letters," which the parties agreed will continue to be in effect during the 2013 – 2016 Collective Bargaining Agreement, as they reflect current practice, have been combined into one "side letter" as set forth below.***
>
> * * * * *
>
> ***10. The Company will provide a coupon at Thanksgiving equal to $16.00.*** (emphasis supplied)

(R. Ex. 1 at 29 - 31)

Additionally, Article IX Complete Agreement clause provides in relevant part:

> . . . ***the Company and Union, for the life of this Agreement, each voluntarily and unqualifiedly waive the right to bargain collectively with respect to any subject or matter referred to or covered in this Agreement,*** or with respect to any subject or matter not referred to specifically or not covered in this Agreement, even though such subject or matter may not have been within the knowledge or contemplation of either or both of the parties at the time they negotiated or signed this Agreement (emphasis supplied),

(R. Ex. 1 at 9)

Based on the foregoing contractual language in the April 18, 2013 side letter, it is clear that the parties agreed to eliminate all past practices set forth in prior side letters including the alleged "longstanding" past practice of paying a $25.00 Thanksgiving bonus, and to abide by the new side letter which the parties agreed constitutes the "current practice." This bargained side letter unequivocally provides that the current practice during the 2013 – 2016 CBA is to pay

employees a $16.00 coupon for the Thanksgiving "bonus." Further, Respondent had no obligation to bargain about the Thanksgiving bonus pursuant to the Article IX Complete Agreement clause as the union waived the right to bargain over any matter referred to in the CBA during the life of the CBA, including the payment of the Thanksgiving bonus.[1] *See, GTE Automatic Electric*, 261 NLRB 1491 (1982)(union clearly and unequivocally waived the right to request bargaining concerning a new benefit during the contract term where the contract contained a similar complete agreement clause).

D. The ALJ Improperly Found that the Confidentiality Agreement was Promulgated in Response to Union Activity And/Or that Employees Could Interpret the Language Regarding "Financial Information" as Prohibiting Them from Discussing Their Compensation

Under the test enunciated in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), if a rule explicitly restricts Section 7 rights, it is unlawful. If it does not, "the violation is dependent upon a showing of one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights." *Id.* at 647. The relevant inquiry regarding the first showing under Section 8(a)(1) is an objective one which examines whether the employer's actions would tend to coerce a reasonable employee. *Affiliated Foods, Inc.*, 328 NLRB 1107 (1999); *Wyman-Gordon Co. v. NLRB*, 654 F.2d 134, 145 (1st Cir. 1981).

The ALJ correctly found that the confidentiality agreement does not expressly prohibit Section 7 rights. However, the ALJ and the GC assert that the language regarding "business plans" somehow violates the first two prongs of *Lutheran Heritage Village Livonia* and cites

1 Significantly, this zipper clause also constitutes a clear and unmistakable waiver of the union's right to bargain over the closure of the Middlesboro plant and transfer of work. *See* Philip A Miscimarra, *The NLRB and Managerial Discretion: Plant Closings; Relocations, Subcontracting, and Automation*, p. 73 (1983).

Flamingo Hilton-Laughlin, 330 NLRB 287 (1999) to support this assertion. However, *Flamingo Hilton-Laughlin* is factually distinguishable as the code of conduct rule in that case prohibited employees from revealing confidential information regarding "customers, ***fellow employees,*** or hotel business." (emphasis supplied).

Here, the confidentiality agreement provides that confidential information includes "business plans" and gives the example of Respondent's plans for locating a new facility and the impact of this new facility on other plants. Curiously, the GC argues that the language "including particularly, but not limited to" in this business plan language somehow makes this provision unclear regarding whether employees can discuss wages. Nowhere in this language is there a reference to any financial information, let alone wages. In fact, "financial information" is separately broken out and includes the following examples: pricing, performance, revenue, sales projections, and other similar financial information regarding the status, performance and plans of Dura-Line. Again, there is no reference to wages and the examples make clear that only business related financial information and not employee related financial information is included. Thus, the language is not ambiguous and employees cannot reasonably interpret this language to prohibit them from discussing wages.

Further, the ALJ and the GC assert that the confidentiality agreement was promulgated in response to union activity, specifically "to prevent foreseeable union activity regarding its relocation." Not surprisingly, the GC fails to cite any authority that holds that preventing unspecified but foreseeable union activity violates the Act and similarly fails to provide any specifics regarding what may constitute foreseeable union activity.

III. CONCLUSION

For all of the foregoing reasons, the Board should reject the arguments in GC's Answering Brief and CPs' Brief, and sustain Respondent's Exceptions.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that on September 11, 2017, a copy of the foregoing *Respondent's Reply to the Counsel for the General Counsel's Answering Brief* was filed via the NLRB e-filing system and was served on all parties via electronic mail to the email addresses listed below:

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